Filed 9/28/09 In re Z.J. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re Z.J., a Person Coming Under the Juvenile Court Law.	B214045
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent. v. A.C. et al., Appellants,	(Los Angeles County Super. Ct. No. CK54306)

APPEAL from orders of the Superior Court of Los Angeles County. Valerie Skeba, Juvenile Court Referee. Affirmed in part; conditionally reversed in part.

Liana Serobian, under appointment by the Court of Appeal, for Appellant A.C.

Arthur J. La Cilento, under appointment by the Court of Appeal, for Appellant G.B.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Respondent.

A.C. (Mother) and G.B. (Grandmother) appeal from February 4, 2009 orders terminating Mother's parental rights to Z.J., born in December 2007, and denying Grandmother's petition for placement or visitation rights (Welf. & Inst. Code, §§ 366.26, subd. (c)(1), and 388[1]). We affirm the order denying Grandmother's petition because she failed to establish that placing Z.J. with her or changing her visitation rights would be in the child's best interest. We agree substantial evidence supports the court's rejection of the beneficial relationship exception to termination of parental rights, but conditionally reverse the order terminating parental rights to allow proper notice to be given to the Bureau of Indian Affairs.

BACKGROUND

Mother has a history of mental disorders, drug abuse and criminal convictions. In 2004 the Los Angeles County Department of Children and Family Services (DCFS) filed a section 300 petition regarding her son, K.C., Z.J.'s sibling. The juvenile court sustained the petition and ordered Mother to undergo drug testing, take all prescribed medications, take parenting classes, and undergo psychiatric and psychological counseling. In 2005, after she failed to comply, the court terminated reunification services and placed K.C. in legal guardianship with Grandmother.

In December 2007, Mother tested positive for marijuana when she gave birth to Z.J. DCFS filed a section 300 petition on behalf of Z.J. six days after he was born and recommended that no reunification services be provided. At the detention hearing Mother requested release of Z.J. into her custody or, alternatively, placement with a maternal aunt. The juvenile court found a prima facie case for detaining Z.J. existed pursuant to section 300, subdivision (b) (failure to protect), and ordered that Z.J. be removed from parental custody and placed in shelter care. Monitored visits were afforded to Mother.

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1 Unspecified statutory references will be to the Welfare and Institutions Code.

At the jurisdiction hearing, DCFS reported that Mother admitted, and relatives confirmed, that she had used marijuana in the past. Mother claimed she stopped when she was 20 weeks pregnant with Z.J., explaining that she tested positive when Z.J. was born because she had been around someone who was using marijuana. DCFS reported Mother's history of emotional problems, including that she had been diagnosed with bipolar disorder and prescribed medication that she refused to take. At the first visit with Z.J., Mother arrived more than an hour late and was abusive and threatening to the caregiver and social worker.[2] Mother missed another scheduled visit.

DCFS recommended that no reunification services be provided because Mother had failed to reunify with Z.J.'s sibling in 2004/2005 and failed to address the issues that had brought the sibling to DCFS's attention. DCFS reported that no local relatives were available for placement of Z.J., but relatives in Louisiana were interested in caring for and adopting him.

The parties entered into a mediated agreement, stipulating to the court's jurisdiction pursuant to section 300, subdivision (b), based on Mother's emotional problems and substance abuse. The court sustained the petition, continued the visitation plan, and ordered DCFS to assist Mother to undergo random drug testing.

At the disposition hearing, DCFS reported Mother missed her first drug test but took the next two, testing negative both times. She enrolled in and attended parenting classes and enrolled in an individual counseling program, attending four sessions in six months. She also enrolled in anger management classes but failed to participate and was disenrolled. She visited Z.J. regularly for several months, but on the last visit threatened

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[2] When told she could not breastfeed the baby (due to concerns about her drug use), Mother is reported to have said, "'You guys have no f***ing right to tell me what sh** I can do. You aren't the court and [I] will put in my baby whatever the f*** I want,'" and "'[y]ou guys better not [] f***ing tell me what the f*** I can and can't do. You all need to get out of my business. You never know what a lady might do. Most people would get up and slap you all in the face and go crazy on you're a**. In fact, I feel like f***ing slapping and hitting you all right now. . . . You don't know me, you don't know what I am going to do. . . .'"

violence toward the monitor. DCFS discontinued visitation. DCFS recommended that Z.J. be suitably placed and no reunification services offered.

The juvenile court denied reunification services and ordered that Z.J. be suitably placed, setting a section 366.26 permanent plan hearing. It ordered DCFS to complete an investigation of the Louisiana relatives under the Interstate Compact on Placement of Children (ICPC; Fam. Code, § 7900 et seq.). Prior consistent orders were ordered to remain in effect.

In September 2008, Mother filed a section 388 petition requesting reunification services. The petition stated Mother "has completed a parenting class and participated in individual counseling . . . . Mother and child have bonded through their visits and mother has demonstrated her commitment to maintaining the bond, travelling a great distance on public transportation to see her son." Attached to the petition was a certificate of completion of parenting classes and a letter from her parenting and counseling program supervisors, stating Mother's "participation in both therapy and parenting classes is positive." The court denied the petition without a hearing.

In preparation for the contested permanent plan hearing, DCFS reported Mother's visits and interactions with Z.J. were regular and appropriate. She visited Z.J. for three hours, two days a week. She bathed and dressed him, fed him, changed his diaper, played and danced with him, comforted him when he cried, and held and rocked him to sleep when he was tired. He laughed and smiled with her and enjoyed playing with her, sought her out during visits, and appeared to be happy and content in her care. DCFS nevertheless recommended termination of parental rights due to Mother's failure to comply with court ordered random drug testing and failure to reunify with K.C.

DCFS reported preliminary ICPC findings indicated placement with the Louisiana relatives was unlikely.

DCFS reported it would determine whether Grandmother would be a suitable placement, but after a subsequent interview concluded her "motivation is questionable." Grandmother had provided care for K.C. for approximately five years but showed only recent interest in adopting him, stating she wanted Mother to regain custody of him once

she gets her life in order. She admitted to allowing Mother unmonitored contact with K.C., in violation of a restraining order filed on April 10, 2007, and stated Mother should get custody of Z.J. because she needed to learn responsibility. DCFS reported that Grandmother's fiancé, with whom she lived, missed an appointment to live-scan, waiting two months before eventually being live-scanned.

The record reflects no significant contact between Grandmother and Z.J. In contrast, Z.J. had been with his current foster parents since he was about a month old, seemed to be happy and well adjusted, and was developing normally. The current foster parents provided him with a safe and loving home and had formed a bond with him. An adoption assessment was completed and Z.J. was found to be adoptable.

DCFS recommended that Z.J. not be placed with Grandmother or the Louisiana relatives. It recommended that parental rights be terminated and that placement and adoption services be instituted in his current placement.

The foster parents were interested in adopting Z.J. if he could not be placed with relatives.

On December 19, 2008, Grandmother filed a section 388 petition requesting that Z.J. be placed with her or in the alternative that she be allowed frequent visitation. She advised that she had completed the Foster Family Home Orientation and two Kin-Gap training programs and provided character references for her fiancé. She said she was "dedicated to raising her grandchildren and has provided excellent care to [K.C.]. . . . [K.C.] repeatedly asks to see his baby brother, stating that he wants [Z.J.] to live with him and be a part of their family."

Z.J. was mistakenly placed with Grandmother from January 22 to 29, 2009.

DCFS opposed Grandmother's section 388 petition, stating in its interim review report that Grandmother "demonstrated an inability or unwillingness to protect the child from [Mother]." She had stated in October 2008 that she believes Mother "should get her baby back." "In December 2005 mother was arrested following her kidnapping of [K.C.] when she took [him] from the grandmother during a visit. The police found mother and [K.C.] in a store after the store's employees called police because mother was causing a

disturbance by trying on clothing and then attempting to walk out with it. Mother also appeared to be under the influence of a controlled substance as she was altered and had white powder on her face. . . . [Grandmother] reported filing a restraining order following this incident, however, the restraining order paperwork indicates it was filed 4/10/07, a delay of 16 months. . . . Despite this order remaining in effect, [Grandmother] has allowed mother numerous unmonitored visits with [K.C.] over the last year. On at least eight documented occasions between July and September 2008, mother came for visits with [Z.J.] and had [K.C.] with her, or he was brought later to the visit by day care personnel."

DCFS reported that when it asked Grandmother in March 2008 whether she would be willing to adopt Z.J., she said he would not "'fit into her current lifestyle.'" When it again asked in August, she "stated her first choice was for [Z.J.] to be placed with other relatives before considering her."

DCFS was concerned that Grandmother's fiancé admitted that public records indicate he has gone by different names, has listed multiple dates of birth, and has an arrest record and a criminal conviction.

Because "grandmother has continued to allow unmonitored contact with [K.C.] even after mother attempted to kidnap him, DCFS" had "concerns for [Z.J.'s] safety with unmonitored visits with grandmother," especially "given mother's frequent volatility during even monitored visits in the DCFS office, and given grandmother's belief that the children should be returned to mother. [¶] Further, both mother and [Grandmother] have made several unfounded allegations as to the care provided by the fost-adopt parents. Unmonitored visits would allow them greater latitude in creating more issues of baseless concern about [Z.J.'s] care. . . . Mother has demonstrated a willingness to ignore consequences and rules in the past and grandmother's continued belief in mother's parenting ability may make her willing to go along with mother in her effort to take [Z.J.]."

DCFS recommended that Z.J. remain a dependent of the court under an order of suitable permanent placement and that parental rights be terminated.

On February 4, 2009, the court heard Grandmother's section 388 petition, at which she introduced evidence by way of her declaration and other documents and was permitted to make an oral argument. The court denied her petition, remarking "It's unfortunate that the home could not be approved earlier. But that's not [Z.J.'s] fault. And I don't believe it's anybody's fault. That's just what happened. . . . I don't believe it would be in the best interests of this child to be removed from a home that he's been in most of his life." The court also terminated Mother's parental rights pursuant to section 366.26.

Mother appeals from the order terminating her parental rights. Grandmother appeals from the order denying her section 388 petition.

DISCUSSION

A. Beneficial Relationship Exception to Termination of Parental Rights

Under section 366.26, subdivision (c)(1), if the juvenile court finds by clear and convincing evidence that a child is adoptable, it will terminate parental rights unless it finds a compelling reason for determining that termination would be detrimental on the basis of certain listed exceptions. Under section 366.26, subdivision (c)(1)(B)(i), the court may forego adoption and refrain from terminating parental rights if a parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination. (*In re Beatrice M*. (1994) 29 Cal.App.4th 1411, 1418.) Loss of mere "frequent and loving" contact with a parent is insufficient to show detriment. (*Ibid*.) The benefit to the child from continuing such a relationship must also be such that the relationship "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*Ibid*., quoting *In re Autumn H*. (1994) 27 Cal.App.4th 567, 575.) A child who is determined to be a dependent of the juvenile court "should not

be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) Adoption, when possible, is the permanent plan preferred by the Legislature if it is likely the child will be adopted. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 573.)

Mother does not deny Z.J. is adoptable, but argues her substantial beneficial relationship with him, as evidenced by her care for him during visitation and his smiling and laughing with her and feeling safe and content in her care, suffices to require continuation of her parental rights. We disagree.

Assuming that Mother maintained regular contact and visitation with Z.J. and that her interaction with him had a positive effect, we conclude substantial evidence supports the juvenile court's finding that Z.J.'s well-being would be promoted more by adoption than by continuation of the parent-child relationship in a more tenuous placement. DCFS reported that Z.J. is happy and well adjusted in his placement and is developing normally. Though he enjoys Mother's company, the juvenile court reasonably could have inferred that his primary bond was with his caretakers because they had bonded with him and he had been living in their home since he was less than a month old. The juvenile court reasonably concluded that his well-being would be promoted more by adoption.

B. Notice Pursuant to the Indian Child Welfare Act

Mother argues DCFS failed to provide meaningful notice of the dependency proceedings pursuant to the Indian Child Welfare Act (ICWA). DCFS agrees to a conditional reversal of the order terminating Mother's parental rights over Z.J. to ensure compliance with ICWA.

C. Denial of Grandmother's Section 388 Petition for Modification

Grandmother argues the court abused its discretion when it denied her section 388 petition.

A parent or any other person may, on grounds of change of circumstance or new evidence, seek modification of a previous order of the court so as to serve the child's best interest. (§ 388, subds. (a), (c).) At any time before the section 366.26 hearing, a parent or any other person may file a section 388 petition seeking reinstatement of reunification services based on changed circumstances. (*In re Marilyn H*. (1993) 5 Cal.4th 295, 308-310.) To succeed on the petition, a petitioner must show, by a preponderance of evidence, that there has been a sufficient change of circumstances to warrant the requested modification, and that the requested change of order is in the child's best interest. (*In re Kimberly F*. (1997) 56 Cal.App.4th 519, 532-535; *In re Casey D*. (1999) 70 Cal.App.4th 38, 47.) After termination of reunification services, however, a parent's interest in the care, custody and companionship of her child is no longer paramount. By this point, the court's focus has shifted squarely to the child's need for permanency and stability. Accordingly, the parent's burden is particularly weighty when the section 388 petition is made on the eve of a section 366.26 permanency-planning hearing, when the children's interest in stability is the court's foremost concern and outweighs any interest in reunification. (*In re Angel B*. (2002) 97 Cal.App.4th 454, 464; see also *In re Edward H*. (1996) 43 Cal.App.4th 584, 594.)

We review the juvenile court's denial of a section 388 petition for abuse of discretion. (*In re Jasmon O*. (1994) 8 Cal.4th 398, 415; *In re Shirley K*. (2006) 140 Cal.App.4th 65, 71.) "We must uphold the juvenile court's denial of appellant's section 388 petition unless we can determine from the record that its decisions '"exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citations.]' [Citations.]" (*In re Brittany K*. (2005) 127 Cal.App.4th 1497, 1505.)

Grandmother first argues the court denied her due process rights by refusing to conduct an evidentiary hearing on her section 388 petition. The argument is without merit.

A person seeking modification must make a prima facie showing to trigger the right to proceed by way of a full hearing on the petition. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) Cases have interpreted section 388 to require both a showing of changed circumstances and that the proposed change of order is in the best interest of the child. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) The juvenile court does not "presume that a child should be placed with a relative, but is to determine whether such a placement is appropriate, taking into account the suitability of the relative's home and the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 321.) Summary denial of a section 388 petition is reviewed for abuse of discretion. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 460; see also *In re Josiah S.* (2002) 102 Cal.App.4th 403, 419.)

Grandmother made no prima facie showing sufficient to trigger a full hearing on her petition. Her only showing regarding Z.J.'s best interests was that she was willing to do "anything" to ensure his emotional health and "the maternal side of his family" has a "strong and loving bond" with him. Though this may constitute a changed circumstance—Grandmother at first did not want custody—it does not establish that the requested change of order is in the child's best interest. The foster caretakers were willing to ensure Z.J.'s emotional health too, and also had a strong and loving bond with him. Moreover, they could give Z.J. something Grandmother could not: continuity. On the eve of a section 366.26 permanency-planning hearing, the child's interest in stability is the court's foremost concern and outweighs any interest in reunification. The court could have reasonably concluded Grandmother failed to make a prima facie showing sufficient to trigger the right to proceed by way of a full hearing on the petition.

At any rate, though the court stated it did not need to hold an evidentiary hearing, it meant only that it did not need to take live testimony. In fact, it conducted an evidentiary hearing by considering Grandmother's declaration and additional documents.

We cannot say the court abused its discretion in finding that Grandmother's evidence of a suitable home for Z.J. failed to demonstrate a material change of circumstances. The detention occurred in December, 2007. When Grandmother was

interviewed in March and August 2008 she indicated Z.J. would not fit into her lifestyle and she would prefer that he be placed with other relatives. She continued to believe Mother should be given custody of both her sons and permitted mother unmonitored contact with K.C. in spite of a restraining order. The juvenile court could reasonably conclude from this that it was not in Z.J.'s best interest to be removed from his potentially adoptive home. The court therefore did not abuse its discretion in determining that the petition, liberally construed, failed to show that a change of placement to Grandmother's home or increased visitation would best promote Z.J.'s interests in permanency and stability.

DISPOSITION

The February 4, 2009 order denying Grandmother's section 388 petition is affirmed.

The order terminating Mother's parental rights to Z.J. is conditionally reversed. The cause is remanded to the juvenile court with instructions to direct DCFS to provide the appropriate ICWA notice of the proceedings to the Bureau of Indian Affairs and any appropriate tribes. If, after receiving notice, no tribe intervenes, the court shall reinstate its judgment. If a tribe does intervene, the court shall proceed in accordance with law.

NOT TO BE PUBLISHED.

CHANEY, J.

I concur:

MALLANO, P. J.

I concur in the judgment only:

ROTHSCHILD, J.